IN THE

Supreme Court of the United States

October Term, 1972
No. 71-651

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

STATE OF CALIFORNIA,
Petitioner,

vs.

JUDITH H. KRIVDA and RODGER T. MINOR,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of California

PETITIONER'S OPENING BRIEF

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PETITIONER'S OPENING BRIEF

Opinion Below

The opinion of the California Supreme Court is reported as *People v. Krivda,* 5 Cal. 3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971). A copy of this opinion is set forth as Appendix A to the Petition for Writ of Certiorari.

The prior opinion of the California Court of Appeal, Second Appellate District, Division One is reported as *People v. Krivda,* 91 Cal. Rptr. 219 (1970). The Court of Appeal opinion was superseded when the California Supreme Court granted a hearing pursuant to Rule 28 of the California Rules of Court. Consequently the Court of Appeal opinion appears only in the unofficial reports. A copy of the Court of Appeal opinion is set forth as Appendix C to the Petition for Writ of Certiorari.

Jurisdiction

The judgment of the California Supreme Court was filed on July 12, 1971, that court entering a further order on August 16, 1971, denying petitioner's petition for rehearing and application for stay of the remittitur. (Petn. for Cert., Apps. A & B.) The Petition for Writ of Certiorari was filed November 12, 1971, and was granted April 3, 1972. The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

Questions Presented

1. Whether a person who deposits contraband in a trash receptacle which he places on public property adjacent to a street, for the purpose of removal by a municipal trash collector, exhibits a reasonable expectation of privacy that such contraband will not be viewed inside the bin of a garbage truck at some distance from the place of pickup and prior to the commingling of the contraband with the trash of other persons?

2. Whether, in any event, application of the exclusionary rule is constitutionally compelled under the circumstances of the present case?

Constitutional Provisions Involved

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV, section 1, in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

A. History of the Case

On September 18, 1968, the District Attorney of Los Angeles County filed an information in the Superior Court of the State of California for the County of Los Angeles charging respondents Judith H. Krivda and Rodger T. Minor with possession of marijuana in violation of section 11530 of the California Health and Safety Code. (App. p. 2.) Respondents' motion to set aside the information pursuant to California Penal Code section 995 was denied. (App. p. 3.) Respondents thereafter entered pleas of not guilty. (App. p. 4.)

Respondents' motion to suppress evidence pursuant to California Penal Code section 1538.5 was submitted on the transcript of the preliminary hearing[1] and on further testimony adduced at a hearing on that motion.[2] (App. pp. 5-6.) The motion to suppress evidence was denied at the conclusion of the hearing held on October 24, 1969. (App. p. 6.) On December 12, 1969,

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[1]The Reporter's Transcript of the preliminary examination is set forth verbatim at pages 10-76 of the Appendix.

[2]The transcript of the additional testimony presented at the hearing on the motion to suppress evidence is set forth at pages 77-83 of the Appendix.

the trial court, with the same judge presiding, permitted the respondents to reopen their motion to suppress evidence. On the basis of the same evidence and arguments previously presented, the trial court reversed its ruling and granted the motion to suppress evidence. On petitioners' representation that no other additional evidence existed, and on the court's own motion, the action was dismissed in the interests of justice. (App. p. 7.)

Petitioner appealed to the California Court of Appeal, pursuant to California Penal Code section 1238, subdivision 7,[3] from the order of the superior court suppressing evidence and dismissing this cause. (App. p. 8.) On November 16, 1970, Division One of the California Court of Appeal for the Second Appellate District reversed the judgment and order of the superior court in an opinion set forth in Appendix C to the Petition for Writ of Certiorari.

The California Supreme Court granted respondents' petition for hearing and, in a 4-3 decision rendered on July 12, 1971, affirmed the superior court's judgment of dismissal and order suppressing the evidence. *People v. Krivda*, 5 Cal. 3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971). (*See* App. A, Petn. for Cert.) On August 16, 1971, the California Supreme Court denied petitioner's petition for rehearing and application for stay of the remittitur. (*See* App. B, Petn. for Cert.)

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[3]Penal Code section 1238 provides:

"An appeal may be taken by the people from any of the following:

". . . .

"7. An order dismissing a case prior to trial made upon motion of the court pursuant to Section 1385 whenever such order is based upon an order granting defendant's motion to return or suppress property or evidence made at a special hearing as provided in this code. . . ."

B. Statement of Facts

On July 1, 1968, Officer Stephen C. Gates of the Los Angeles Police Department received a telephone call from an anonymous female informant who told him that "Rodger" and "Judy" were engaging in narcotic activities, *i.e.*, smoking marijuana and injecting methedrine. (App. pp. 12-13.) The informant indicated that there were many sex parties at their 1901 Nolden residence in Los Angeles and that a Lesbian named "Frankie" was living there. The informant also indicated that both Rodger and Judy were injecting the two children who resided at that location with methedrine. The informant said that she had heard this from Judy, who said she enjoyed the effects of methedrine and that she also wanted her children to experience the feeling of being under the influence of methedrine. (App. pp. 12-13.)

After receiving this information, Officer Gates and his partner, Officer William Marsden, located the address and observed two young female children in front of the premises. Officer Gates then ran a utility check which indicated that Judy Krivda was paying for the utilities at 1901 Nolden. (App. pp. 13, 48.) Officer Gates also checked criminal records with the Los Angeles Police Department and determined that three individuals with the last name of Krivda had been arrested in Los Angeles. Upon further investigation Officer Gates discovered that one of these individuals, Edward Joseph Krivda, had a wife named Judy. (App. p. 13.) The records also indicated that Edward Joseph Krivda had been arrested for possession of dangerous drugs for sale and also for sale of dangerous drugs. (App. p. 14.)

At about 11 a.m. on July 9, 1968, Officer Gates and his partner returned to the vicinity of 1901 Nolden. The residence at that address was a single family dwelling. (App. p. 14.) From their vantage point, the officers observed several trash barrels directly in front of the house at 1901 Nolden. (App. pp. 14-15, 17.) The trash barrels were in the parkway adjacent to the sidewalk, thirty to forty yards from the house. (App. pp. 17, 28.) The home adjacent to 1901 Nolden was approximately twenty feet down the hill. (App. p. 15.)

The officers observed refuse collectors approximately a block away from the house at 1901 Nolden. (App. p. 14.) Officer Gates stopped the collectors approximately half a block west of the premises. (App. pp. 14, 18.) After identifying himself as a police officer, Officer Gates told the trash collectors that he was interested in looking at the contents of the trash barrels in front of 1901 Nolden. (App. pp. 14-18.) He asked them to empty the well of their truck, to pick up the trash in front of the house at 1901 Nolden, and then to meet Officer Gates and his partner approximately one block north of the location. (App. pp. 14, 18, 70.)

Officer Gates observed the refuse collectors drive their truck to the front of the premises at 1901 Nolden. He observed them go to the back of the truck, take the trash barrels, place the contents of the trash barrels in the well, and then drive north to where he and Officer Marsden were waiting. Officer Gates had examined the well of the trash truck prior to the emptying of these specific garbage cans into the well. There had been no refuse at all in the well prior to the emptying of the garbage cans at 1901 Nolden. Officer

Gates did not observe the collectors empty any other garbage cans into the well of the truck between the time they placed the trash from those cans into the well and the time the truck arrived at his location. (App. pp. 18-19.)

When Officer Gates examined the contents of the well of the trash truck, he observed approximately five brown paper sacks among the refuse. Upon examining the sacks, he found that they contained what appeared to be marijuana debris and marijuana seeds. (App. p. 19.) In one of the bags, Officer Gates found approximately four to six partially burned marijuana cigarettes. (App. pp. 20, 57.) Also among the contents in the well of the trash truck, Officer Gates found an envelope with the name Edward Krivda and the address 1901 Nolden, a handwritten letter with the name Frankie mentioned in it, and a three-by-five card with the names Rodger and Judy written on it. (App. pp. 20-21.)

After Officer Gates had examined the contents of the well of the trash truck, he went back to his former vantage point. There he observed respondent Rodger Minor come from the premises at 1901 Nolden and pick up the trash barrels which had contained the marijuana debris. Respondent Minor, wearing only a towel around his waist, took the trash barrels to the front porch of the house. (App. pp. 21-22, 81.)

At this point Officer Gates and his partner requested the assistance of a uniformed sergeant. The uniformed officer and Officer Gates approached the front of the premises while Officer Marsden positioned himself at the rear. When respondent Minor met Officer Gates at the front door, Officer Gates placed him under arrest for possession of marijuana. (App. pp.

22, 40, 43.) The officers then effected entry, discovered respondent Krivda in the residence, and recovered additional marijuana and paraphernalia. (App. pp. 23-25, 46.)

Summary of Argument

When the police examined the respondents' trash in the well of the trash truck parked a block away from respondents' home, the trash was abandoned property. The respondents' acts of (1) discarding the trash into their trash barrels and (2) then placing the trash barrels on the parkway for collection unambiguously demonstrated the requisite intent to abandon. It is well established that "There can be nothing unlawful in the Government's appropriation of abandoned property." *Abel v. United States,* 362 U.S. 217, 241 (1960).

Furthermore, the respondents had no "reasonable expectation of privacy" either as to the location of the search or as to the items seized from the trash. The well of a trash truck parked a block away from respondents' home is not within those areas immediately adjacent to the home which are protected by the Fourth Amendment. After the barrels were placed on the parkway, their contents were subject to numerous risks of public exposure. Respondents had also given the trash collector such complete and unrestricted control over their trash that they may be said to have accepted the risk that he might permit the police to examine the contents of their trash barrels. The Fourth Amendment does not protect ". . . a wrongdoer's misplaced belief that a person to whom he confides his wrongdoing will not reveal it." *Hoffa v. United States,* 385 U.S. 293, 302 (1966). There is no indication that society generally expects garbage to remain pri-

vate after it has come to rest in the well of a trash truck. To extend Fourth Amendment protection to the trash abandoned by respondents would elevate the trash barrel to the status of a constitutional sanctuary for the concealment and disposal of evidence of crime.

Apart from the question of whether the Fourth Amendment protects a right of privacy in one's trash, this case raises the issue of whether the exclusionary rule should have any application to the type of police conduct involved here. The law at the time of the search clearly permitted the appropriation of abandoned property. The exclusionary rule should not be used to discipline police officers who have attempted to act within the constitutional limits of the Fourth Amendment. The entire deterrent rationale of the exclusionary rule is open to serious question which may require its abandonment. Short of a complete reconsideration of the wisdom of retaining the exclusionary rule, petitioner proposes that the rule be limited to flagrant violations of the Fourth Amendment where the conduct of the police is truly lawless.

ARGUMENT

I

After the Contents of Respondents' Trash Barrels Had Been Deposited in the Well of the Trash Truck, the Discovery and Seizure of the Discarded Contraband Did Not Violate the Fourth Amendment Rights of Respondents

In sustaining the trial court's suppression of evidence in this case, the California Supreme Court held that the conduct of the police officers in examining respondents' trash after it had been transferred from the barrels on the curb to the well of the trash truck contravened the Fourth Amendment's prohibition against unreasonable searches and seizures. The court rejected petitioner's argument that trash, as abandoned property, was not within the scope of Fourth Amendment protection. *People v. Krivda,* 5 Cal. 3d 357, 365-66, 96 Cal. Rptr. 62, 68, 486 P.2d 1262, 1268 (1971). Instead, the court rested its decision on the premise that respondents Krivda and Minor ". . . had a reasonable expectation that their trash would not be rummaged through and picked over by police officers without a search warrant." *People v. Krivda,* 5 Cal. 3d at 367, 96 Cal. Rptr. at 68, 468 P.2d at 1268. This conclusion departs from established constitutional principles governing the appropriation of abandoned property and represents an unjustified extension of the privacy interests protected by the Fourth Amendment.

A. No Issue of Search and Seizure Cognizable Under the Fourth Amendment Arises From Police Examination of Abandoned Trash

There have been only two prior occasions when this Court has examined the concept of abandoned property in relation to the law of search and seizure. In both instances, this Court concluded that the exclusionary proscriptions of the Fourth Amendment were inapplicable to the seizure of the items found to have been abandoned by a criminal defendant.

The first case in which this Court dealt with abandoned property in the context of search and seizure was *Hester v. United States,* 265 U.S. 57 (1924). In that case, this Court held that revenue officers had properly retrieved several containers of illegally distilled whiskey which they had seen petitioner and one Henderson discard in an open field as they were attempting to flee from the federal officers. Writing for the Court, Mr. Justice Holmes, in disposing of the claim of illegal search and seizure, stated:

> "The officers had no warrant for search or arrest, and it is contended that this made their evidence inadmissible, it being assumed, on the strength of the pursuing officer's saying that he supposed they were on Hester's land, that such was the fact. It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned. . . ." *Hester v. United States, supra,* 265 U.S. at 58.

Mr. Justice Holmes then went on to hold that the protection given to " 'persons, houses, papers, and effects,' did not extend to the open fields." *Id.* at 59. Although the "open fields" doctrine was tendered as an alternative basis for the Court's decision in *Hester*, that decision was the origin of the principle that no seizure in Fourth Amendment terms resulted from the recovery of abandoned property by government agents.

Subsequently, in *Abel v. United States*, 362 U.S. 217 (1960), this Court relied upon *Hester* as having firmly established that principle in the law of search and seizure. The issue of abandoned property in *Abel* arose out of the search of the petitioner's hotel room immediately after he had paid his bill and had vacated the room. An F.B.I. agent, who conducted the search of the hotel room, found a hollowed-out pencil and a wooden block containing a "cipher pad" in a wastepaper basket. These items were subsequently used as evidence at petitioner's trial for conspiracy to commit espionage. With respect to the seizure of these items, Mr. Justice Frankfurter wrote for the Court:

> "Nor was it unlawful to seize the entire contents of the wastepaper basket, even though some of its contents had no connection with crime. So far as the record shows, petitioner had abandoned these articles. He had thrown them away. So far as he was concerned, they were *bona vacantia*. There can be nothing unlawful in the Government's appropriation of such abandoned property. See Hester v. United States, 265 U.S. 57, 58. . . ." *Id.* at 241.

Hester and *Abel* thus established the guiding principle that one's personal right to Fourth Amendment protection of property against unreasonable search and

seizure is lost when that property is abandoned. *See United States v. Edwards,* 441 F.2d 749, 752 (5th Cir. 1971). The owner of personal property brings his right of privacy to an end by abandoning the property. *Corngold v. United States,* 367 F.2d 1, 7 (9th Cir. 1966). When property has been abandoned, there is no issue of search and seizure within the meaning ascribed to those terms in the context of the Fourth Amendment. *Burton v. United States,* 272 F.2d 473, 476-77 (9th Cir. 1959), *cert. denied,* 362 U.S. 951 (1960); *Jackson v. State,* 235 So.2d 382, 385 (Ala. Crim. App. 1970); *People v. Lopez,* 22 App. Div. 2d 813, 254 N.Y.S. 2d 806 (1964). *See also Caldwell v. United States,* 338 F.2d 385, 388 (9th Cir. 1964), *cert. denied,* 380 U.S. 984 (1965). Thus, the inspection or examination of abandoned property by police officers is not a search, and the appropriation of such property may be effected without probable cause. *See* Mascolo, *The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis,* 20 Buff. L. Rev. 399, 401 (1971).

In analyzing whether the trash discarded by respondents was abandoned property not subject to Fourth Amendment protection, it is instructive to examine the concept of abandonment as it has been developed in the law of property. At the outset, one is cautioned that "Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law. . . ." *Silverman v. United States,* 365 U.S. 505, 511 (1961). The principal object of the Fourth Amendment is the protection of privacy rather than property, and this Court has increasingly discarded fictional and procedural barriers resting on property concepts. *Warden v. Hayden,* 387

U.S. 294, 304 (1967). Property law concepts, however, are not wholly irrelevant to an analysis of the scope of constitutional protection afforded by the Fourth Amendment. For example, a defendant's standing to challenge an allegedly unlawful search or seizure requires, as a minimum, that there be some nexus between the particular intrusion and the privacy interests of the person raising the claim. *See Alderman v. United States*, 394 U.S. 165, 171-75 (1969). Although the capacity to claim Fourth Amendment protection does not depend upon a property right in a place subjected to governmental intrusion, *Mancusi v. De Forte*, 392 U.S. 364, 368 (1968), this Court has never held that a defendant may object to the seizure absent some connection between the defendant and the items seized at some point in time. One commentator has explained the relationship of property concepts to the Fourth Amendment treatment of abandoned property problems in this way:

> "When the issue of abandonment is raised in a criminal proceeding, the initial point of inquiry for a court should be directed toward the concept that has evolved with the development of property law. Although this concept is not controlling on the issue of abandonment in the law of search and seizure, it is a point of reference because it defines the property aspect of the issue. From this, a court should then proceed to the remaining, and critical, constitutional aspect, which determines whether the individual's activities had the effect of intentional and voluntary termination of his right of privacy in the property discarded. Thus, the issue of abandonment under the fourth amendment is composed of the dual qualities of property and privacy." Mascolo, *supra*, 20 Buff. L. Rev. at 401.

The New York Court of Appeals has formulated the test of abandonment, as a property law concept, in the following terms:

> ". . . . The abandonment of property is the relinquishing of all title, possession, or claim to or of it—a virtual intentional throwing away of it. It is not presumed. Proof supporting it must be direct or affirmative or reasonably beget the exclusive inference of throwing away. . . ." *Foulke v. New York Consol. R. Co.*, 228 N.Y. 267, 273, 127 N.E. 237, 238 (1920).

Abandonment has also been defined as "the relinquishment of a right or of property with the intention of not reclaiming it or reassuming its ownership or enjoyment." *Ellis v. Brown*, 177 F.2d 677, 679 (6th Cir. 1949).

Abandonment has been held to be largely a question of intent which, in turn, is a question of fact. *United States v. Minker*, 312 F.2d 632, 634 (3d Cir. 1962), *cert. denied*, 372 U.S. 953 (1963). An intention to abandon may not be inferred "if the conduct of the owner can be explained consistently with a continued claim." *Linscomb v. Goodyear Tire & Rubber Co.*, 199 F.2d 431, 435 (8th Cir. 1952). Although abandonment will not be presumed, the intent of one in possession of property often cannot be directly shown but must be inferred from his actions. *See United States v. Robinson*, 430 F.2d 1141, 1143 (6th Cir. 1970). Abandonment does not require performance of any particular ritual, and it may be inferred from an unambiguous act of intentional discard. *See United States v. Cowen*, 396 F.2d 83, 87 (2d Cir. 1968).[4]

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[4]Less proof may be required to establish an abandonment in the context of Fourth Amendment protections than would be re-

(This footnote is continued on next page)

Under these rules, the respondents' act of discarding contraband into their trash barrels was an act from which one may reasonably infer an intent to abandon. This conduct was inconsistent with any continued claim over the items placed in the trash can. The only reasonable conclusion inferable from the fact that items have been placed in a wastepaper basket or a trash can is that they have been thrown away and hence abandoned.

This Court's opinion in *Abel v. United States, supra,* implicitly recognizes the validity of drawing an inference of abandonment from a defendant's act of depositing items in a wastepaper basket. The weight of authority clearly favors that conclusion irrespective of whether the trash receptacle happens to be a wastepaper basket or a garbage can. *United States v. Dzialak,* 441 F.2d 212, 215 (2d Cir. 1971) (seizure of items from trash left between sidewalk and street in front of appellant's home); *United States v. Stroble,* 431 F.2d 1273, 1276 (6th Cir. 1970) (items seized were lying by the side of two garbage cans adjacent to curb and were observed by a police officer while he was still on public street); *United States v. Minker, supra,* 312 F.2d at 634-35 (government agents arranged with trash collector to permit them to examine contents of trash receptacle located outside appellant's apartment building and used by other tenants); *State v. Purvis,* 249 Ore. 404, 410, 438 P.2d 1002, 1005

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quired to establish an abandonment in ordinary civil litigation. For example, the fact that the owner of an automobile locks and leaves his car will not ordinarily be inconsistent with a continued claim of possession. Yet if a suspect fleeing the police leaves his car in the path of flight and runs away on foot, his car is deemed abandoned so as to permit a search of its interior absent either a warrant or probable cause. *See United States v. Edwards, supra,* 441 F.2d at 753.

(1968) (police examined items removed by maid in usual course of cleaning a hotel room). Other cases reach the same result by holding that a defendant has no reasonable expectation of privacy in garbage deposited in a public receptacle or turned over to the trash collector. *United States v. Jackson*, 448 F.2d 963, 971 (9th Cir. 1971) (seizure of items of evidence from a public trash can outside of defendants' motel room); *Croker v. State*, 477 P.2d 122, 125 (Wyo. 1970) (police examined contents of garbage collector's barrel after defendant's garbage had been removed from his garbage cans).[5] *Cf. Marullo v. United States*, 328 F.2d 361, 363 (5th Cir.), *cert. denied*, 379 U.S. 850 (1964) (motel occupant had no right of privacy as to stolen money orders removed from top of brick pillar supporting the motel cabin).

Apart from the decision of the court below in this case, there appear to be only two cases which have rejected an inference of abandonment from the act of depositing articles in a trash can. The first of these cases was *Work v. United States*, 243 F.2d 660, 662-63 (D.C. Cir. 1957), in which then Circuit Judge Burger dissented. In *Work* police officers removed a phial of narcotics from a trash can located in an area under the front porch of the defendant's house. Upon coming to the defendant's house, the officers had observed her walk to the trash can and make motions

[5]It should be observed that the decision of the Wyoming Supreme Court in *Croker v. State, supra*, is factually identical to the present case in that the defendant's trash had been removed from the defendant's own garbage can by the trash collectors when the police conducted their examination of the refuse discarded. In *United States v. Minker, supra*, the opinion indicates that government agents arranged to have the trash collector permit them to examine the contents of a trash receptacle, but it is not clear where that examination took place.

as if putting something into it. The Court of Appeals held that the articles seized were not abandoned so as to lose the protection of the home provided by the Fourth Amendment. The court stated:

> ". . . . The trash receptacle in which the phial was found was in close proximity to the house. It was an adjunct to the domestic use of the home by appellant. It was within the curtilage or 'general enclosure surrounding the dwelling.' " *Work v. United States, supra,* 243 F.2d at 662 (citations omitted).

The Court of Appeals found to be immaterial the fact that the receptacle might have been partially visible from the street. It further held that the placing of the phial in the trash receptacle was not to be construed " 'as an abandonment of the phial unless to persons impliedly or expressly authorized to remove the receptacle's contents, such as the trashmen, for purposes of destruction. . . .' " *Id.* at 663.

The second case rejecting an inference of abandonment as to the contents of trash can is a prior decision by the same court that decided the instant case below. *People v. Edwards,* 71 Cal. 2d 1096, 80 Cal. Rptr. 633, 458 P.2d 713 (1969). In *Edwards,* the California Supreme Court adopted the reasoning of *Work v. United States, supra,* and held that the placement of marijuana in a trash can located within a few feet within the back door of defendants' home was not an abandonment unless as to persons, such as trashmen, authorized to remove the receptacle's contents.

Both *Work* and *Edwards* are distinguishable from the instant case. Both cases involved trash receptacles located adjacent to a defendant's home. In *Work,* the Court of Appeals apparently inferred from the circum-

stances of that case that the defendant had merely intended to hide the narcotics in the trash can, an intent consistent with a continued claim of possession and inconsistent with an intent to abandon. *See Work v. United States,* 243 F.2d at 663. The circumstances of the *Edwards* case are similarly susceptible of the same inference.

In contrast, the facts of the present case will not support any inference of continuing possessory rights. The respondents' conduct manifested an unequivocal intent to relinquish all further rights over the contents of their trash cans. Even if the act of depositing the contraband in the trash barrels were insufficient by itself to prove an abandonment, the further act of placing the barrels on the parkway for collection established the intent to abandon beyond question.

Work and *Edwards* are also distinguishable on the ground that the trash cans were situated in very close proximity to defendants' houses. Even if the contents of the trash can in these two cases had been found to have been abandoned, the location of the trash receptacles may have brought them within the constitutional protection accorded to open areas immediately adjacent to a house. At common law, these areas were denominated by the term "curtilage." In *Care v. United States,* 231 F.2d 22, 25 (10th Cir.), *cert. denied,* 351 U.S. 932 (1956), the concept of the "curtilage" was defined as follows:

> ". . . Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family."

While both *Work* and *Edwards* are explainable in terms of the protection accorded to areas immediately adjacent to a house, the instant case involved activity that was obviously beyond the furthest extension of the curtilage surrounding the respondents' home. The examination of trash located in the well of the trash truck parked on a public street at least a block away from the respondents' home could hardly be considered an intrusion into an area immediately adjacent to the house whose use and enjoyment was an adjunct to the domestic economy of respondents Krivda and Minor. Indeed, if the respondents had been arrested at the location where the police officers inspected the trash, the defendants' house would have been beyond the immediate vicinity of the arrest for purposes of an incidental search of that house. *See Vale v. Louisiana,* 399 U.S. 30, 34-35 (1970).

Based upon the foregoing analysis, petitioner submits that the inspection and appropriation of the contraband found in respondents' trash was wholly outside the protective ambit of the Fourth Amendment. Under the facts of this case, the only reasonable inference to be drawn from the respondents having deposited the contraband in the trash barrels and then having placed the trash barrels on the curb is that they intended to relinquish all further claim over the items therein. Such an inference is the essence of abandonment. The only point remaining for discussion is whether this Court's shift of emphasis from constitutionally protected areas to reasonable expectations of privacy requires a different result than that reached under the earlier constitutional approach. The next section of this argument will demonstrate that the change in approach should not require a change in result.

B. Respondents Have No Reasonable Expectation of Privacy With Respect to Their Abandoned Trash

Prior to *Katz v. United States,* 389 U.S. 347 (1967), the search and seizure decisions of this Court tended to focus on whether the location searched was a "constitutionally protected area." *See e.g., Berger v. New York,* 388 U.S. 41, 57, 59 (1967); *Lopez v. United States,* 373 U.S. 427, 438-39 (1963); *Silverman v. United States,* 365 U.S. 505, 510, 512 (1961). In *Katz,* the Court eschewed this phrase as a mode of analysis, stating that ". . . the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.'" 389 U.S. at 350. The Court explained that the term was only descriptive of a conclusion and was not meant to serve as a "talismanic solution to every Fourth Amendment problem." *Id.* at 351 n. 9. Mr. Justice Stewart's opinion for the Court further states:

> "[O]nce it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.* at 353.

Rejecting the traditional formulation of the Fourth Amendment, the Court found that the government's electronic eavesdropping activities had violated the privacy upon which the petitioner had justifiably relied while using a telephone booth. *Id.* The *Katz* opinion did not elaborate on the concept of "justifiable reliance," except to state that ". . . what [a person] seeks to preserve as private, even in an area

accessible to the public, may be constitutionally protected." *Id.* at 351-52.

The concurring opinion of Mr. Justice Harlan has served as a gloss to explain what the Court intended by its reformulation in *Katz* of the approach to search and seizure questions arising under the Fourth Amendment. In Justice Harlan's view, these questions were to be resolved in terms of the individual's "reasonable expectation of privacy." *Id.* at 360. His concurring opinion explains this phrase in these terms:

> ". . . . My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. (Citation omitted.)" *Id.* at 361.

Justice Harlan's test directed towards "reasonable expectations of privacy" has since been adopted by the majority of the Court in several subsequent decisions. *Terry v. Ohio,* 392 U.S. 1, 9 (1968); *Alderman v. United States, supra,* 394 U.S. at 179 n.11. Other decisions after *Katz* have contained variations on the same theme. *Mancusi v. De Forte, supra,* 392 U.S. at

368 ("reasonable expectation of freedom from governmental intrusion"); *United States v. White*, 401 U.S. 745, 752 (1971) ("what expectations of privacy are constitutionally 'justifiable'—what expectations the Fourth Amendment will protect in the absence of a warrant").

Although this Court's emphasis has shifted from places to persons, that change of outlook should not compel a difference of result in cases involving the government's seizure of abandoned property for use as evidence in criminal cases. A reanalysis of these decisions in terms of the individual's "reasonable expectation of privacy" should demonstrate the owner's right of privacy ends at the point he abandons his property to the waste basket or the trash barrel.

At the outset, a person claiming Fourth Amendment protection must be found to have an actual, subjective expectation of privacy in the area searched or the thing seized. An evaluation of subjective expectations will serve to exclude from further analysis those cases where the defendant has voluntarily relinquished control over items of evidence which prove to be incriminatory upon discovery by the police. The rationale for withdrawing Fourth Amendment protection from this class of cases is that the courts should not assign any greater importance to discarded articles than their previous owner attached to their possession. If he really wanted his privacy interests to be protected, all he had to do was safeguard their possession within an area demonstrably intended to be private. In default of such precautions, he should be held to the dictum in *Katz* that "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." 389 U.S. at 351.

From the preceding discussion, it is readily apparent that the instant case is subject to exclusion from the scope of Fourth Amendment protection because the circumstances of this case raise no supportable inference of the respondents' having a subjective expectation of privacy either in the place searched or in the items seized. Yet even if this case were not screened out at this initial stage, the respondents' pretensions to a subjective expectation of privacy would not be recognized as reasonable by society. *See Katz v. United States, supra,* 389 U.S. at 361 (Mr. Justice Harlan concurring). Only when the purported victim of an illegal search or seizure has a "reasonable expectation of privacy" in the place searched or the items seized can he be said to have "justifiably relied" on privacy interests protected by the Fourth Amendment. *See id.* at 353. The loosely defined reliance standard in the *Katz* decision provides little in the way of guidelines for determining when an individual's expectations of privacy are reasonable in the constitutional sense. As with other areas in the law of search and seizure, each case must be judged on its own particular facts in determining the reasonableness of one's expectation of privacy. *See Wong Sun v. United States,* 371 U.S. 471, 479 (1963).

The student authors of an article written shortly after the *Katz* decision have suggested that three factors should be considered in determining whether persons claiming Fourth Amendment protection have a reasonable expectation of privacy warranting such protection. The three factors are (1) the nature of the intended area of private control, (2) the defendant's right to exclusive use of that area or facility, and (3) the degree to which society honors the intimacy or

privacy of the activity normally carried on in such a place. *See* Note, *From Private Places to Personal Privacy: A Post-Katz Study of Fourth Amendment Protection*, 43 N.Y.U. L. Rev. 968, 983-84 (1968). By use of these three tests, the authors of the note argue that the privacy due an individual in a given place can be evaluated without relying on property concepts. *Id.* at 984.

The first factor, the nature of the intended area of private control, is a logical point of departure. Although we are now admonished that the Fourth Amendment protects people, not places, Mr. Justice Harlan noted in his concurring opinion that:

> ". . . . The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.'" *Katz v. United States, supra,* 389 U.S. at 361.

Apparently elaborating upon Justice Harlan's observation, the authors of the New York University note added this perspective:

> ". . . . The degree of privacy offered by structural characteristics, such as partitions or walls, is an important determinant of an area's character. While it might be argued that walls and windows should be weighed only as factors affecting the reasonableness of the expectation of privacy and not given additional emphasis, it is submitted that an enclosed area exhibits to the world a clear demarcation between inside and outside, private and public, and, in so doing, visibly asserts the right to have this boundary respected. . . ." Note, *supra,* 43 N.Y.U. L. Rev. at 983-84.

In applying this analysis to the present case, it is clear that the respondents erected no visible boundary demarcating the privacy interests which they would have this Court protect. In this case, the intended area of private control is the well of the trash truck parked a block away from the respondents' home. The respondents cannot seriously maintain that they had a reasonable expectation of privacy with respect to the locus of the search. The respondents' trash left the area of private control over which they had a reasonable expectation of privacy as soon as it left the areas immediately adjacent to their house within which constitutional protection was accorded. *See Care v. United States, supra,* 231 F.2d at 25. Once the abandoned trash was placed on the public parkway, it was no longer within a protected area of private control. After it had been emptied into the well of the trash truck, all possible claims of private control over the locus of the search clearly had been dissipated. Since the search of the contents of the trash cans took place in the well of a trash truck parked on a public street, the respondents lacked any connection, by property interest or otherwise, which gave them a justifiable basis for an expectation of privacy in the area searched.

A second consideration of importance in the privacy interest approach to Fourth Amendment protection is whether the claimant had a right to exclusive use of the area searched or the things seized. The more an individual exposes his personal affairs to others, the less likelihood there is of constitutional protection. To reiterate familiar language, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States, supra,* 389 U.S. at 351. Thus,

an index of the Amendment's protection of individual privacy is the degree of risk of intrusion by other persons including governmental agents.

In the instant case, the trash discarded by the respondents was subject to the risk of exposure from the moment the trash barrels were placed on the parkway for collection. Nosy neighbors or curious passersby might easily examine the contents of the garbage cans. There was an ever-present danger that domestic animals, such as dogs and cats, might upset the trash containers and expose their contents to public view. The trash collector himself was also free to examine the trash before emptying it into the well of his truck. If he were the least bit clumsy, there was the possibility that he might spill a portion of the contents on the roadway in front of the respondents' house. When and if the contents of the trash barrels reached the dump, they would hardly have been private there. Trash deposited at a dump may be picked over by scavengers and is exposed to other members of the public who bring their trash directly to the dump. In these days of heightened interest in ecology, one cannot fully anticipate how many persons may actually pour over the contents of a householder's trash barrels in quest for recyclable materials. The opinion of the court below concedes:

> "Of course, one must reasonably anticipate that under certain circumstances third persons may invade his privacy to some extent. It is certainly not unforeseen that trash collectors or even vagrants or children may rummage through one's trash barrels and remove some of its contents. . . ." *People v. Krivda, supra,* 5 Cal. 3d at 367, 96 Cal. Rptr. at 69, 486 P.2d at 1269.

Thus, an expectation of privacy as to one's discarded trash is hardly reasonable. In this context, privacy is at best a faint hope. For this reason, the respondents should not be permitted to cry "Foul" when police officers conduct an examination the risk of which respondents accepted from other members of the public.

The California Supreme Court concluded that an abandonment of one's trash to the trash collector was not ". . . necessarily an abandonment of one's trash to the police or general public." *People v. Krivda, supra,* 5 Cal. 3d at 366, 96 Cal. Rptr. at 68, 486 P.2d at 1268. Unfortunately, the California Supreme Court cites no authority for the novel doctrine of partial abandonment. Like pregnancy, abandonment by definition cannot be partial. Either one has voluntarily relinquished all of his property interest in discarded items, or he has not.

Even if one were to assume that an abandonment of trash to the trash collector was not an abandonment to the public at large or to the police, it is clear that there are circumstances when an owner may give another such complete and unrestricted freedom over his property that he will have accepted the risk that the person so entrusted would consent to a search, thus losing his right to privacy. *See United States v. Edwards, supra,* 441 F.2d at 752 and cases cited. The case of *Clarke v. Neil,* 427 F.2d 1322 (6th Cir. 1970) is an apt illustration of this point. In *Clarke,* the manager of a dry cleaning establishment let the police conduct a laboratory examination of a suit delivered to him by the defendant for cleaning. The laboratory examination revealed the presence on the suit of certain fibers matching those in the murder victim's clothing.

The Court of Appeals for the Sixth Circuit held that the evidence from the laboratory examination was admissible because the court was unable to find any significant invasion of anything which appellant had sought to preserve as private. The court noted that appellant had delivered the suit to the cleaners open to public view, that he knew the suit could be handled and examined by many persons in the course of the cleaning process, but that he in no way tried to conceal the suit or anything contained thereon, nor did he try to restrict the number of persons who handled it. 427 F.2d at 1325.

The same reasoning should apply with even more force in the instant case. For here the respondents retained no property interests in the trash examined by the police whereas the defendant in *Clarke v. Neil* still retained the rights of a bailor under implied bailment. The rule adopted by the court below could only serve to deprive the police of information and evidence provided by citizens, such as the dry cleaner in *Clarke* and the garbage men in this case, who have come to the aid of law enforcement. It is well recognized that the effective enforcement of our criminal law depends in large part on the voluntary cooperation of public spirited citizens. *See, e.g.*, Report of the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society*, 99 (1967).

The decisions of this Court support the reasoning of the Sixth Circuit in *Clarke*. In *Hoffa v. United States*, 385 U.S. 293, 302 (1966), this Court held that the Fourth Amendment does not protect ". . . a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal

it." Subsequently in *United States v. White*, 401 U.S. 745, 752 (1971), this Court further observed:

> "Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his. . . ."

It is hardly a meaningful distinction that the respondents in this case confided the evidence of their wrongdoing to a garbage collector instead of a police informant or turncoat accomplice. Under the circumstances of this case, the respondents assumed the risk that the garbage collectors might permit the police to examine their trash upon request.

The third criterion of protectible privacy interests under the Fourth Amendment is "the degree to which society honors the intimacy or privacy of the activity normally carried on in such a place." (Footnote omitted.) Note, *supra*, 43 N.Y.U. L. Rev. at 984. Since virtually every governmental action interferes with personal privacy to some degree, the question in each case is whether that interference violates a command of the United States Constitution. *Katz v. United States supra*, 389 U.S. 350 n. 5. For this reason, it is necessary that ". . . an individual's otherwise reasonable expectation of privacy be buttressed by social norms; the intended walls of privacy must have some objective validity." Note, *supra*, 43 N.Y.U. L. Rev. at 984.

There are several indications that society attaches no special character of intimacy to trash deposited on the curb for collection. It is common knowledge that the

major credit card companies advise their cardholders to mutilate their expired credit cards before discarding them as trash. The obvious reason for such warnings is that one's trash can is not secure from the depredations of criminals who might later alter and use such cards. Similarly the average citizen is at the mercy of potential forgers when he deposits cancelled checks bearing specimen signatures into his garbage cans. Furthermore, it is doubtful that few, if any, persons harbor subjective expectations of privacy with respect to their garbage. As Chief Justice Burger observed while on the United States Court of Appeals for the District of Columbia Circuit:

> "Honest citizens neither need nor, I think, want protection for their privacy extended to these artificial limits, and a presently confessed, previously convicted narcotics violator is not entitled to it. Of course the guilty should have the same protective safeguards as the innocent and I would afford them as much. But I refuse to join in what I consider an unfortunate trend of judicial decisions in this field which strain and stretch to give the guilty, not the same, but vastly more protection than the law-abiding citizen. . . ." *Work v. United States, supra,* 243 F.2d at 665 (dissenting opinion). (Footnote omitted.)

The extension of Fourth Amendment protection to the trash abandoned by the respondents in this case would be tantamount to making the garbage receptacle an inviolate sanctuary for the concealment and disposal of evidence of crime. The court below relied on *People v. Edwards, supra,* 71 Cal. 2d at 1104, 80 Cal. Rptr. at 738, 458 P.2d at 718, in holding that the privacy interests protected by the Fourth Amend-

ment did not terminate ". . . at least not until the trash had lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere. . . ." *People v. Krivda, supra,* 5 Cal. 3d at 366, 96 Cal. Rptr. at 68, 486 P.2d at 1268. Thus, the California Supreme Court creates a new right to have one's trash commingled with the trash of others under the guise of interpreting the Fourth Amendment. If that right is upheld by this Court, a new means will have been fashioned by which criminals may avoid detection simply by depositing the instrumentalities and evidence of crime in a wastepaper basket or garbage can. The net effect of the decision will be to remove the crucial link in the chain of evidence connecting the defendant with the corpus of the crime. While the Fourth Amendment is intended to protect a person's papers and effects from unreasonable searches and seizures by government agents, it has never been construed as protecting those papers and effects after they have ceased to be the property of the defendant.

In summary, the respondents' own acts of abandonment negate any subjective expectation of privacy under the circumstances of this case. The intended area of private control was the well of a trash truck on a public street, far beyond the open areas immediately adjacent to respondents' house which were entitled to constitutional protection. The respondents' rights with respect to their abandoned trash were nonexclusive. And lastly, it cannot be said that society honors the intimacy or privacy of one's garbage after it has come to rest in the well of a trash truck. These reasons all support the ultimate conclusion that one has no constitutionally justifiable expectation of privacy in the items he abandons to the trash barrel placed on the curb.

II

The Exclusionary Rule Should Not Be Applied Under the Circumstances of the Present Case

Apart from the narrow question of whether the Fourth Amendment protects a right of privacy in one's trash, the circumstances under which this case arose present a more significant issue for decision by this Court. That issue is whether the exclusionary rule should have any application at all to the type of police conduct involved in this case. Here the police had apparent justification for their belief that an examination of respondents' trash in the well of the trash truck was not an unreasonable search. No less authority than this Court had held that there was nothing unlawful in the government's appropriation of abandoned property. *Abel v. United States, supra,* 362 U.S. at 241. Thus, an application of the exclusionary rule here would only serve to penalize the police officers for their good-faith reliance on what appeared to be settled law. Such a penalty is hardly consistent with the often expressed dictum that the exclusionary rule ". . . is calculated to prevent, not to repair." *Elkins v. United States,* 364 U.S. 206, 217 (1960).

The manner in which this case arose provides a vivid illustration of the uncertainty which confronts the average police officer seeking an answer to the everyday question of whether he has probable cause to arrest or search. The trial court first ruled that the evidence challenged in this case was admissible. (App. p. 6.) After permitting respondents to reopen their motion to suppress, the trial court reversed its previous ruling based upon the same evidence and arguments previously presented. (App. p. 7.) Thereafter all three judges of the California Court of Appeal held the chal-

lenged evidence to be admissible. That decision was overturned when the California Supreme Court granted a hearing and ruled, four to three, that the evidence was inadmissible. (App. A & C, Pet. for Cert.) It can scarcely be said that this monumental state of confusion was the result contemplated when the exclusionary rule was devised. It is therefore imperative that the rule be re-examined in an attempt to eliminate the intolerable state of uncertainty which faces every law enforcement officer performing his day-to-day duties in the field.

A. The Exclusionary Rule Has Proved Ineffective as a Safeguard of Fourth Amendment Rights While Diverting Critical Resources From the Major Goals of the Criminal Process

The principal function of the exclusionary rule in the field of search and seizure has been explained by this Court on numerous occasions. In *Elkins v. United States, supra,* at 217, the Court stated:

> "The purpose of the exclusionary rule is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."

When this Court applied the exclusionary rule to the States in *Mapp v. Ohio,* 367 U.S. 643 (1961), the *Elkins* statement was quoted with approval in setting forth the purpose of the rule as commanded by the due process requirements of the Fourteenth Amendment. *Id.* at 656. Subsequently in *Linkletter v. Walker,* 381 U.S. 618, 637 (1965), the Court reiterated that "the purpose [of the *Mapp* decision] was to deter the lawless action of the police."

There has been growing skepticism as to whether the exclusionary rule has more than a minimal effect

in deterring unlawful searches and seizures. The most thorough study of this issue to date concluded:

> ". . . . The foregoing findings represent the largest fund of information yet assembled on the effect of the exclusionary rule, but they obviously fall short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule. . . ." Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. Chi. L. Rev. 665, 709 (1970).

There are, however, strong indications that the deterrent effect of the exclusionary rule is limited to a narrow range of cases. First of all, the rule is structured so that it applies only when the fruits of an unlawful search are introduced at a criminal trial. When an unlawful search fails to reveal evidence of crime, the victim of that search is not protected by the exclusionary rule. Any deterrent effect as to this class of cases depends solely upon the individual policeman's respect for the Constitution. In those cases where the protections of the Fourth Amendment have been applied to invalidate administrative searches, the exclusionary rule has not come into play. *See Camara v. Municipal Court,* 387 U.S. 523 (1967); *See v. City of Seattle,* 387 U.S. 541 (1967). Hence these cases do not dilute the force of Chief Justice Warren's observation in *Terry v. Ohio,* 392 U.S. 1, 14 (1968), that:

> "Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal." (Footnote omitted.)

In those instances where the police are motivated by goals other than obtaining convictions, the exclusionary rule cannot claim any truly deterrent effect. Examples of such objections are found in the enforcement of liquor, gambling and narcotics laws where confiscation of contraband is at least as important as securing the offender's conviction. In these types of cases, this Court has not removed the incentive for potentially unlawful searches or seizures because the confiscation is upheld regardless of whether the defendant is convicted. As this Court has held on more than one occasion, the suppression of evidence does not in itself entitle the aggrieved person to the return of contraband. *Warden v. Hayden,* 387 U.S. 294, 307-08 (1967); *Trupiano v. United States,* 334 U.S. 699, 710 (1948).

Secondly, the deterrent effect that may exist appears to be without real force. It does not operate directly as a sanction on the police officers involved and its educational value is diminished by the great time lag between the challenged search and the ultimate decision of the highest court to review the case. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388, 416-18 (1971) (dissenting opinion of Mr. Chief Justice Burger).

The trenchant criticisms of the exclusionary rule are well known to this Court. As Mr. Justice Jackson observed in *Irvine v. California,* 347 U.S. 128, 135-37 (1954):

> "What actual experience teaches we really do not know. Our cases evidence the fact that the federal rule of exclusion and our reversal of conviction for its violation are not sanctions which put an end to illegal search and seizure

by federal officers. The rule was announced in 1914 in *Weeks v. United States*, 232 U.S. 383. The extent to which the practice was curtailed, if at all, is doubtful. The lower federal courts, and even this Court, have repeatedly been constrained to enforce the rule after its violation. There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it. . . . That the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters invasions of right by the police. . . . The disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be no more than a mild deterrent at best." (Footnote omitted.)

This Court must eventually consider whether the social cost of retaining the exclusionary rule outweighs the minimal protection afforded by this approach to enforcement of the Fourth Amendment. The tension created by the rule stems from the fact that it serves "neither to protect the victim nor to punish the offender but rather to compensate the guilty victim by acquittal and to punish the public by unloosing the criminal into their midst. . . ." 8 *Wigmore on Evidence* § 2184, pp. 51-52 (McNaughton ed. 1961).

Professor Oaks expressed similar concern in his 1970 study of the exclusionary rule:

"The use of the exclusionary rule imposes excessive costs on the criminal justice system. It provides no recompense for the innocent and it frees the guilty. It creates the occasion and in-

centive for large-scale lying by law enforcement officers. It diverts the focus of the criminal prosecution from the guilt or innocence of the defendant to a trial of the police. Only a system with limitless patience with irrationality could tolerate the fact that where there has been one wrong, the defendant's, he will be punished, but where there have been two wrongs, the defendant's and the officer's, both will go free. This would not be an excessive cost for an effective remedy against police misconduct, but it is a prohibitive price to pay for an illusory one. . . ." Oaks, *supra*, 37 U. Chi. L. Rev. at 755.

Other commentators have also concluded that the essentials upon which the exclusionary rule depends have not been adequately achieved. LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 Mich. L. Rev. 987, 1003 (1965).

In the field of constitutional adjudication, it has long been recognized that the policy considerations favoring the doctrine of *stare decisis* are less compelling than in other fields of law where "it is more important that the applicable rule of law be settled than that it be settled right." *Burnett v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406, 410 (1932) (dissenting opinion of Mr. Justice Brandeis). When experience proves that a rule created by judges should never have been created at all, or that their rule, though originally sound, has become unsuited to new social conditions, a reconsideration of the old rule may reveal "the unwisdom of its expansion or imperatively require its revision or abandonment." *Francis v. Southern Pacific Co.*, 333

U.S. 445, 453 (1948). As Mr. Justice Douglas has written, "So far as constitutional law is concerned *stare decisis* must give way before the dynamic component of history." Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 737 (1949).

Since this Court held in *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) that the exclusionary rule was an essential part of both the Fourth and Fourteenth Amendments, any alteration of the rule must come from this Court, rather than from Congress or any State legislature. It is, of course, open to serious question whether the exclusionary rule is constitutionally required as an inherent part of the Fourth Amendment's guarantee against unreasonable searches and seizures. In *Wolf v. Colorado*, 338 U.S. 25, 28 (1949), the Court noted that the initial application of the exclusionary rule to the federal system "was not derived from the explicit requirements of the Fourth Amendment." Mr. Justice Black expanded on this view of the origin and requirements of the exclusionary rule with these words:

> "Had the framers of this Amendment desired to prohibit the use in court of evidence secured by an unreasonable search or seizure, they would have used plain appropriate language to do so, just as they did in prohibiting the use of enforced self-incriminatory evidence in the Fifth Amendment. Since the Fourth Amendment contains no language forbidding the use of such evidence, I think there is no such constitutional rule. So I continue to believe that the exclusionary rule formulated to bar such evidence in the *Weeks* case is not rooted in the Fourth Amendment but rests on the 'supervisory power' of this

> Court over the other federal courts—the same judicial power involved in *McNabb v. United States*, 318 U.S. 332. . . ." *Berger v. New York*, 388 U.S. 41, 76 (1967) (dissenting opinion).

Mr. Justice Blackmun joined with Mr. Justice Black, concurring and dissenting in *Coolidge v. New Hampshire*, 403 U.S. 443, 497, 510, wherein it was said:

> "The *Weeks* opinion made no express confession of a break with the past. But if it was merely a proper reading of the Fourth Amendment, it seems strange that it took this Court nearly 125 years to discover the true meaning of those words. The truth is that the source of the exclusionary rule simply cannot be found in the Fourth Amendment. . . ."

Against this backdrop, Mr. Chief Justice Burger wrote in his *Bivens* dissent that:

> "I do not propose, however, that we abandon the Suppression Doctrine until some meaningful alternative can be developed. In a sense our legal system has become the captive of its own creation. . . ." *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, supra*, 403 U.S. at 420 (dissenting opinion).

Many alternatives to the exclusionary rule have been suggested, most of which would also have some deterrent effect upon Fourth Amendment violations. *See, e.g.*, Report of the Task Force on Law and Law Enforcement to the National Commission on the Causes and Prevention of Violence, *Law and Order Reconsidered*, pp. 365-409 (1969); Cox, *The Decline of the Exclusionary Rule: An Alternative to Injustice*, 4 Sw.

U. L. Rev. 68 (1972); Horowitz, *Excluding the Exclusionary Rule—Can There Be an Effective Alternative*, 47 L.A. Bar Bull. 91 (1972). The absence of an effective alternative was one of the grounds of decision in *Mapp. v. Ohio, supra*, 367 U.S. at 652. It should be noted, however, that this Court's almost exclusive reliance upon the exclusionary rule as a means of preserving Fourth Amendment rights may constitute the principal obstacle to the development of effective alternatives. Professor Oaks study concluded:

> "The exclusionary rule cannot be replaced as long as it remains a constitutional requirement. However, there is no *legal* obstacle to *supplementing* the exclusionary rule, especially in areas where it is admittedly ineffective. The obstacle is a *practical* one. The enormous concentration and reliance upon the exclusionary rule may forestall the development of alternative mechanisms for controlling improper behavior by the police. By a peculiar form of federal preemption, the *Mapp* decision may sap state officials' energy and determination to control law enforcement officials in alternative ways that might prove just as effective and even more comprehensive than the exclusionary rule. . . ." *Oaks, supra*, 37 U. Chi. L. Rev. at 753. (Emphasis in original; footnote omitted.)

While no one reasonably disagrees with the proposition that there should be some remedy for illegal searches and seizures violative of the Fourth Amendment, the real question "is whether suppression of the truth with consequent acquittal of the guilty is a fair and an effective measure to that end." *State v. Bisaccia*, 58 N.J. 589, 590, 279 A.2d 675, 677 (1971).

Even in the absence of a substitute remedy, it is difficult to comprehend the wisdom of retaining a rule which benefits only the guilty victim of an unlawful search. The absence of equal protection for the innocent victim is perhaps the best argument for an abandonment of the rule. The exclusionary rule should be abandoned, but if the inadequacies of the rule are not yet fully apparent, it should nonetheless be restricted to the level of critical tolerance suggested in the following analysis.

B. Application of the Exclusionary Rule Should Be Limited to Those Circumstances Which Gave Rise to the Need for Its Existence

The Fourth Amendment to the Constitution of the United States was ratified in 1791 against the "intellectual matrix" of the struggle between the Crown and the opposition press led by author and editor John Wilkes during the 1760s. *Marcus v. Search Warrant*, 367 U.S. 717, 728-29 (1961). An effective but abusive tool of the Crown had been use of general warrants. The words of the Fourth Amendment reflect the determination of the newly independent Americans to be free "from intrusion and seizure by officers acting under the unbridled authority of a general warrant," which was known as a writ of assistance and had given custom officials blanket authority to search where they pleased for goods imported in violation of British tax laws. *Stanford v. Texas*, 379 U.S. 476, 481 (1965).

The exclusionary rule, or suppression doctrine, found expression by the United States Supreme Court in *Weeks v. United States*, 232 U.S. 383, 398 (1914). Purely as "a matter of judicial implication" to protect the "security of one's privacy against arbitrary intru-

sion by the police—which is at the core of the Fourth Amendment . . ." illegally seized evidence was held inadmissible in a federal criminal prosecution. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). Citing this wording in the *Wolf* decision, the Supreme Court of the State of California applied the exclusionary rule to California prosecutions "because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers." *People v. Cahan*, 44 Cal. 2d 434, 445, 282 P.2d 905, 911-12 (1955). Relying heavily upon the rationale of this California decision, the United States Supreme Court in 1961 applied the exclusionary rule to state criminal prosecutions and closed "the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of" the right to privacy free from unreasonable state intrusion. *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961).

From its inception the exclusionary rule "has had only a precarious tenure in this Court." *Mancusi v. DeForte*, 392 U.S. 364, 373 (1968) (Justices Stewart and Black dissenting). "[D]espite its impressive support from our highest courts, the rule's vitality has always been precarious due to the illogical situation which exists when a man's guilt or innocence is determined by the means used to obtain the evidence against him." Horowitz, *supra*, 47 L.A. Bar Bull. at 92. The impact that this intellectual paradox has upon the average citizen was described by Professor John Waite as causing a deprecation of group ideals which results in derogation of the potentiality that abstention from crime will be achieved through conformity with group idealism. Waite, *Judges and the Crime Burden*, 54 Mich. L. Rev. 169, 192-93 (1955). Judge

Shirley M. Hufstedler of the United States Court of Appeals for the Ninth Circuit has articulated the extent to which the exclusionary rule exacts a high price in terms of the respect for our institutions of justice.

> "The subtleties of that enforcement by indirection have almost wholly escaped the public and appear to have often deluded the Court itself. The message most widely received is that the Fourth Amendment is a shield solely for the guilty. It is a hard message to correct because the visible beneficiaries of the exclusionary rule are persons subjected to searches and seizures that have yielded evidence of crime. People subjected to illegal searches that turn up nothing do not appear in the criminal process. Illegal searches rarely surface in a civil proceeding because legislatures and courts have not created effective civil remedies.
>
> "Increasing public anxiety about crime, escalating attacks upon courts, and continuing dissatisfaction with results of the exclusionary rules have combined to impose great pressure to cut the rules to levels of critical tolerance." Hon. Shirley M. Hufstedler, "The Directions and Mis-Directions of a Constitutional Right of Privacy," Twenty-Eighth Annual Benjamin N. Cardozo Lecture delivered before the Association of the Bar of the City of New York, May 11, 1971, p. 20. (Footnotes omitted.)

Whether the negative effects of the exclusionary rule are unavoidable consequences of the pursuit to secure Fourth Amendment rights presents a serious question. This Court in *Mapp v. Ohio*, 367 U.S. 643,

657 (1961), held that the exclusionary rule was an essential part of both the Fourth and Fourteenth Amendments. What due process requires, however, is not fixed adherence to standards of what has previously been deemed reasonable and right. Due process is a living principle which cannot be confined to what may at a given time be deemed the limits or the essentials of fundamental rights. *Wolf v. Colorado,* 338 U.S. 25, 27 (1948). " 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts." *Hannah v. Larche,* 363 U.S. 420, 442 (1960). The question, then, is whether the essentials of due process have at all been altered by the eleven-year evolution following the epic decision in *Mapp.*

In considering the interaction of due process and Fourth Amendment violations, it is well to remember the two basic aims suggested by Mr. Chief Justice Warren E. Burger in his article entitled, "Who Will Watch the Watchman?" 14 Am. U. L. Rev. 1, 10 (1964):

> "Perhaps we can all agree on two basic aims: first, that deterring official misconduct in law enforcement is a vital objective for society; and second, that society and the administration of justice are best served by vastly reducing, and if possible eliminating, the need to exclude relevant and probative evidence from a criminal trial whose very truth-seeking function is necessarily stultified to some degree by such exclusion. . . ."

At present the exclusionary rule fails in its principal objective of deterring official misconduct, and it thereby fails to protect the individual substantially

while at the same time it causes a disproportionate loss of protection for society. But the major emphasis is not one of contrasting interests between the individual and society, for the individual is society. What we are actually considering is contrasting interests of the individual in society. The right to privacy can be violated by the criminal as well as the police. This point was recognized by Chief Justice Weintraub of the New Jersey Supreme Court when he wrote:

> "The first right of the individual is to be protected from attack. That is why we have government, as the preamble to the Federal Constitution plainly says. . . . The Bill of Rights was not intended to deny that primary mission. This is not to belittle the inestimable rights thus consecrated, but rather to say that those rights may not be read to defeat the very reason for government itself.
>
> "We must be mindful that the contest is not between the State and the individual. The contest is wholly between competing rights of the individual—the right to be protected from criminal attack and the several rights in the Amendments. When the truth is suppressed and the criminal is set free, the pain of suppression is felt, not by the inanimate State or by some penitent policeman, but by the offender's next victims for whose protection we hold office. In that direct way, *Mapp* denies the innocent the protection due them." *State v. Bisaccia*, 58 N.J. 586, 590, 279 A.2d 675, 677 (1971).

It is a consideration of these contrasting interests of the individual which gives proper definition to the exclusionary rule. What must be sought is a reconciliation between the purpose of the rule and the pain of

suppression inflicted upon innocent victims by its persistent application.

The exclusionary rule was created to protect the privacy of the individual from certain specific conduct on the part of police officers. The conduct sought to be controlled in *Mapp* was described as "official lawlessness in flagrant abuse" of the right to privacy, "unconscionable invasions of privacy," and "utter disregard of the enforceable Fourth Amendment." *Mapp v. Ohio*, 367 U.S. 643, 655, 657, 658 (1961). The conduct in *Mapp* was precisely that. Three police officers arrived at Miss Mapp's residence pursuant to information that a person was hiding in the home who was wanted for questioning in connection with a recent bombing. The officers knocked on the door and demanded entrance, but Miss Mapp, after telephoning her attorney, refused to admit them without a search warrant. Three hours and four additional officers later, the officers forcibly opened the door when Miss Mapp did not respond immediately. Although Miss Mapp's attorney arrived, he was not permitted to see her or enter the house. When Miss Mapp demanded to see a search warrant, a paper was held up by one of the officers which she grabbed and placed into her bosom. A struggle ensued in which the officers recovered the paper, handcuffed Miss Mapp because she had been belligerent, and twisted her hand, causing her to yell and plead with the officers.

This conduct is similar to that which occurred in other cases and engendered the following descriptions:

> "flagrant disregard of the procedure which Congress has commanded"—*McNabb v. United States*, 318 U.S. 332, 345 (1943).

"arbitrary intrusion"—*Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949).

"flagrantly, deliberately, and persistently violated the fundamental principles declared by the Fourth Amendment—*Irvine v. California*, 347 U.S. 128, 132 (1954).

"willful disobedience of a Constitution they are sworn to uphold"—*Elkins v. United States*, 364 U.S. 206, 223 (1960).

"arbitrary invasions by government officials"—*Camara v. Municipal Court*, 387 U.S. 523, 528 (1967).

The words of these courts in describing the prohibited action fall into two categories: *first*, deliberate, willful, and utter disregard; *second*, flagrant, arbitrary, and unconscionable. Thus, the activity to be deterred by the exclusionary rule is that which deliberately or flagrantly violates Fourth Amendment rights. To deter this conduct the exclusionary rule should be applied only in case of deliberate or flagrant violation.

It is contrary to the philosophy of the exclusionary rule to apply it where the violation by the police officer is at most inadvertent. In order for the deterrence theory to have any validity, the police officer must be able to discern right from wrong. He must be able to perceive that conduct which he is to avoid. As was stated by Mr. Justice Traynor in delineating the exclusionary rule in *People v. Cahan, supra*, 44 Cal. 2d at 448, 282 P.2d at 913: "Police officers and prosecuting officials are primarily interested in convicting criminals. Given the exclusionary rule and *a choice* between securing evidence by legal rather than by illegal means, officers will be impelled to obey the laws themselves

since not to do so will jeopardize their objectives." (Emphasis added.) This will be true only where the police officer knows that he has a choice, that is, only where he knows that his proposed activity would be in violation of Fourth Amendment rights.

Application of the exclusionary rule must be tempered with the realization that a police officer is not as well equipped as an appellate court justice to deal with legal technicalities. *See Brinegar v. United States*, 338 U.S. 160, 175 (1949). The police officer does not have the same education, training, or experience as that of an appellate court justice, nor is the police officer in a position to devote as much time to making a legal determination. Indeed, as to the disparity in education alone, a 1961 survey of over 300 police departments revealed that 24 percent of those departments had no minimum educational prerequisite, while less than one percent required any level of college preparation. The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police*, p. 126 (1967).

Certainly it is illogical to require of a policeman a standard of performance which would be unconstitutionally void for vagueness if applied to the ordinary citizen because the standard required an intricate knowledge of the law and the expertise of a legal technician. As Judge Friendly has suggested, "It does not seem consistent with the objective of deterrence that the maximum penalty of exclusion should be forced for an error of judgment by a policeman, necessarily formed on the spot and without a set of the *United States Reports* in his hands, which is not apparent years later to several Justices of the Supreme Court." Friendly, *The Bill of Rights as a*

Code of Criminal Procedure, 53 Calif. L. Rev. 929, 952 (1965).

It is clear that many authorities believe that the exclusionary rule cannot work where there is no "distinct rule consensus" in that a "nine man rule of reason almost seems destined for vagueness." Burns, *Mapp v. Ohio: An All-American Mistake,* 19 DePaul L. Rev. 80, 88 (1969). Professor Charles Alan Wright has criticized the complexity of the laws relating to search and seizure and noted that:

> "A police officer will not be deterred from an illegal search if he does not know that it is illegal. The law of search and seizure is hopelessly complicated and confused . . . It defies reality to think that the average police officer could hold all of that arcane learning in his head or that he could always apply it correctly when he is required to make quick decisions in the course of the difficult and often dangerous business of law enforcement." Wright, *Must the Criminal Go Free if the Constable Blunders?,* 50 Texas L. Rev. 736, 740-41 (1972).

The exclusionary rule has been successful in providing police officers with a basis of knowledge upon which they may make an educated determination that specific conduct is not a search or that the search is reasonable. The California Attorney General has prepared and distributed pamphlets designed to inform police officers of the laws relating to search and seizure. Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan,* 43 Calif. L. Rev. 565, 587-88 (1955).

In applying this basic knowledge to a determination of probable cause, the police officer must determine whether there is more evidence for than against, supported by evidence which inclines the mind to believe but which leaves some room for doubt. *People v. Ingle,* 53 Cal. 2d 407, 412-13, 2 Cal. Rptr. 14, 17, 348 P.2d 577, 580 (1960); *see also, Berger v. New York,* 388 U.S. 41, 59 (1967). It has been noted by this Court that "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment." *Hill v. California,* 401 U.S. 797, 804 (1971). Therefore, when it appears to the police officer that it is sufficiently probable that the action he intends to take does not violate Fourth Amendment rights, the exclusionary rule should not be applied. There is no deliberate or flagrant violation of Fourth Amendment rights to deter, and it is contrary to the spirit of the common law to apply a rule to a situation in which the reason for the rule does not exist. *Crandall v. Woods,* 8 Cal. 136, 143 (1857).

Of central importance in developing the criteria with which to determine whether a violation is deliberate or flagrant is the ease with which a police officer may apply these standards to his conduct. An elaborate and intricate system of rules can do little but confuse an already perplexed police officer. Therefore police conduct should be measured by considering whether:

1. The conduct has clearly been proscribed by a settled rule;

2. When the conduct is not covered by a settled rule, it should appear to a reasonable officer in like circumstances that the rationale of existing rules would prohibit the particular conduct;

3. The time in which the officer was reasonably required to act permitted the officer adequately to reflect upon the propriety of the proposed conduct.[6]

Application of this test to the facts of the present case demonstrates that the action taken by Officers Gates and Marsden in examining respondents' trash in the well of the truck did not constitute a deliberate or flagrant violation of Fourth Amendment rights. As shown in Argument I, *supra,* no settled rule proscribed the action they took, and it would not appear to a reasonable officer in like circumstances that the rationale of existing rules would prohibit their conduct. Three justices of the Court of Appeal and three justices of the California Supreme Court have so held. (App. A and C, Pet. for Cert.)

Therefore, it must be said that the action taken by Officers Gates and Marsden was reasonable to a sufficient probability and was not the type of flagrant or deliberate violation of Fourth Amendment rights which the exclusionary rule was designed to prevent. Application of the exclusionary rule only to the situations which it was designed to deter results in a benefit to law enforcement by authenticating the fact-finding process. "As against the minor peril to Fourth Amendment protections, there is a major gain in effective law enforcement." *Coolidge v. New Hampshire,* 403 U.S. 443, 467 (1971).

In view of the lack of perceptible logic inherent in the exclusionary rule and its apparent ineffectiveness

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[6]This formulation contains the substance of the criteria developed by the American Law Institute for application in the proposed "substantial violation" test. ALI, Model Code of Pre-Arraignment Procedure, § SS 8.02(2), p. 23 (Tent. Draft No. 4, 1971).

in directly deterring Fourth Amendment violations, it is essential that the scope of the exclusionary rule be limited to those circumstances which gave rise to its existence. Application of the deliberate or flagrant violation test strikes a proper balance between the competing interests of the individual in society—the right to be protected from criminal attack and the right preserved by the Fourth Amendment.

Conclusion

For the foregoing reasons petitioner, the State of California, submits that examination of abandoned trash does not amount to an unreasonable search and seizure proscribed by the Fourth Amendment and that, in any event, the exclusionary rule should not be applied under the circumstances of this case. Petitioner urges that the judgment of the California Supreme Court be reversed.

Respectfully submitted,

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The State of California has been authorized by the Attorneys General of the following states and territories to list them as joining with us in our brief on the merits.

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Service of the within and receipt of a copy thereof is hereby admitted this 7th day of July, A.D. 1972.

Proof of Service Enclosed